PUBLIC PROSECUTOR

v.

NORDIN JOHAN & ANOR.

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH LP
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER FJ
[CRIMINAL APPEAL NO. 2 OF 1983]
9 JUNE 1983

CRIMINAL LAW AND PROCEDURE: *Security case - Whether Court obliged to call accused to enter defence at the end of prosecution case notwithstanding the absence of a prima facie case.*

EVIDENCE: *Statement of co-accused implicating the respondents was admitted and accepted - Whether to be considered without some cogent evidence against the respondents.*

The appeal was against the acquittal of the 2 respondents who were charged under the Internal Security Act and tried in accordance with the Essential (Security Cases) Regulations, 1975. At the end of the prosecution's case the learned trial Judge acquitted the respondents on the ground that the prosecution had failed to prove a *prima facie* case. The appellant urged the Court to review and disapprove the decision of the learned trial Judge who based his judgment on the Federal Court case, *PP v. Sihabudin*, wherein it was held by majority that in a security case, the Court is not obliged to call on the accused to enter on his defence, at the end of the prosecution case, unless the prosecution has then proved a *prima facie* case. The appellant further raised the question of the application of the provisions of s. 30 of the Evidence Act in relation to the 2 respondents, as a result of the statement made by one Rahmat Satiman, the 3rd accused in these proceedings, which was admitted and accepted and which clearly implicated the 2 respondents.

Held:

[1] The decision in *PP v. Sihabudin* was supported not only by good sense but by those considerations of justice and fair play in an adversary system of trial.

[2] The evidence against the 2 respondents, apart from the 3rd accused's confession was not sufficient to satisfy the requirements of the charge against them and that calling on their defence would not only go beyond taking into consideration the 3rd accused's statement but would be tantamount to relying on it, which would not be permissible for the purposes of s. 30 of the Evidence Act.

[Appeal dismissed]

Cases referred to:
Public Prosecutor v. Sihabudin [1980] 2 MLJ 273

Legislation referred to:
Evidence Act 1950, s. 30
Penal Code, s. 34

For the appellant - Abu Talib bin Othman, (Lim Beng Choon SFC & T.S. Sambanthamurthi SFC, with him); Attorney-General
For the 1st respondent - G. Sri Ram (V. Balasingam & Zulkifly with him)
For the 2nd respondent - James Ponniah

JUDGMENT

Raja Azlan Shah LP:

An elaborate argument has been addressed to us by the Public Prosecutor on one vital point which is said to afford a ground for impugning the decision of the learned trial Judge, the point being that he drew wrong inferences from the facts as found and accepted by him.

We have been urged by the Public Prosecutor in this appeal against the acquittal of the 2 respondents to review and disapprove the decision of this Court in *PP v. Sihabudin* [[1980] 2 MLJ 273] which held by majority that in a security case at the end of the prosecution case the Court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him, and to hold that the provisions of the Essential (Security Cases) Regulations 1975 mandatorily require the defence to be called in every case when the prosecution case is closed, notwithstanding the absence of a *prima facie* case. We do not demur in substance from the view of the law as expressed by Suffian, LP. In our opinion it is supported not only by good sense but by those considerations of justice and fair play as one would expect to find in an adversary system of trial which we practise in this country.

This leaves the question of the application of the provisions of s. 30 of the Evidence Act in relation to the 2 respondents as a result of the statement made by Rahmat Satiman, the 3rd accused in these proceedings, which was admitted and accepted and which clearly implicates the 2 respondents. Section 30 provides that this statement may be taken into consideration against the 2 respondents but on the decided authorities the prerequisite to this is that there must be some cogent evidence against them quite apart from the statement of the 3rd accused. The nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must *ex necessitate rei* be a factual matter in the context and circumstances of the particular case.

Having considered the evidence against the 2 respondents which is fairly voluminous and lengthy, the learned Judge came to the conclusion that it did not in relation to them have any real probative value to the charge and even taken as a whole did not take the prosecution case any where for the purposes of proving common intention under s. 34 of the Penal Code. The learned trial Judge had opportunities which are denied to us of considering whether it would be safe to draw the inference that the 2 respondents were present at the scene of the crime and participated in the commission of the offence. He said:

> Does the totality of the evidence against the second accused and the fourth accused excluding the confession (P101) lead the Court to the irresistible inference that they were present at the scene of the crime and participated in the commission of the offence? I am afraid I am unable to honestly give an affirmative answer to this question.

The approach of an appellate Court in a case like this is well established. In such a case it is its duty to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly.

The question as it seems to us is whether the learned trial Judge was reasonably entitled in all the circumstances to come to the conclusion he did that the 2 respondents were not at the scene of the crime and were not *participes criminis* in respect of the actual crime charged. We would answer that question in this way: that on the basis of the facts which the learned

Judge had found and accepted, his decision was one which any reasonable tribunal properly directed, as was done in this case, could have reached and we do not think that we ought to accede to the Public Prosecutor's argument that certain adverse inferences should be made on the evidence adduced.

On a considered view of the case we find no justification to warrant interference with the learned trial Judge's conclusion in this matter. We are satisfied that the evidence against the 2 respondents, apart from the 3rd accused's confession, was not sufficient to satisfy the requirements of the charge against them and that calling on their defence would on the authorities not only go beyond taking into consideration the 3rd accused's statement but be tantamount to virtually relying on it to an extent that would not be permissible for the purposes of s. 30 of the Evidence Act.

We would accordingly in the circumstances dismiss this appeal by the Public Prosecutor.

Also found at [1983] 2 CLJ 22